IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

CONNER AIR LINES, INC., and E. A. CONNER,

Petitioners,

v.

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION and L. B. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE
THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

CITATION TO OPINIONS BELOW

The opinion and judgment of the United States District Court in and for the Southern District of Florida is unreported. The opinion of the Court of Appeals is not yet reported. The text of the opinion is attached hereto as Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The date of the judgment sought to be reviewed is June 30, 1960.

(ii) The date of the order denying petitions for rehearing is August 12, 1960. No petition for extension of time to petition for certiorari has been applied for or granted.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

THE QUESTION PRESENTED FOR REVIEW

WHERE A LENDER IN A FLORIDA TRANSACTION HAS BEEN FOUND GUILTY OF CIVIL USURY, AND SPECIFIC AMOUNTS OF INTEREST AND BONUS HAVE BEEN FOUND TO HAVE BEEN INCLUDED IN THE FACE PRINCIPAL SUM OF NEGOTIABLE NOTES TAKEN BY THE LENDER FROM THE BORROWER, DOES FLORIDA LAW REQUIRE THE FEDERAL COURT TO DEDUCT

FROM THE ACTUAL PRINCIPAL SUM INVOLVED AN AMOUNT EQUAL TO DOUBLE THE INTEREST AND BONUS SO FOUND TO HAVE BEEN RESERVED OR EXACTED?

Both the District Court and the Court of Appeals found respondents guilty of civil usury. The District Court deducted an amount equal to double the bonus but refused to deduct an amount equal to double the interest. The Court of Appeals refused to deduct any amount from the actual principal sum and restored respondents' judgment to the full principal sum.

THE STATUTES INVOLVED

The statutes involved are Florida Statutes 1955: §687.03 and §687.04, reading as follows:

> 687.03 Unlawful rates of interest defined; proviso. — It shall be usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent per annum, either directly or indirectly by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and such transaction with a corporation shall, whereby the

corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.

687.04 Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face. ⇔ Any person, or any agent, officer or other representative of any person, willfully violating the provisions of Sec. 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved; or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the

same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in Sec. 687.06.

STATEMENT OF THE CASE

The respondent Aviation Credit Corporation, a Delaware corporation, filed suit to quiet title, seeking a declaration that it was the full legal and equitable owner of a Douglas DC-6 aircraft and its equipment. One of the defendants was the United States of America, three individual defendants were citizens and residents of the State of Florida, and the defendant Conner Air Lines, Inc., was a Florida corporation. Jurisdiction of the United States District Court was based on diversity of citizenship and joinder of the United States of America as a defendant, and on the amount involved, to wit, $600,254.67 plus interest. No question exists as to the jurisdiction of the District Court.

Conner Air Lines, Inc. and F. A. Conner counterclaimed against plaintiff and cross-claimed against respondents L. B. Smith Aircraft Corporation, an Ohio corporation, and L. B. Smith, a citizen and resident of the State of Nevada. The defense, the counterclaim and the cross-claim were based upon a charge of usury.

Following trial before the District Court without a jury, said Court found that interest computed at the rate of 11.58% per annum, plus a $33,310.18 bonus for financing, had been included in the face principal sum of negotiable promissory notes aggregating $600,254.67, and that the aforesaid bonus had been reserved by respondents in willful violation of the Florida usury law.

The actual principal sum involved was found to have been $459,083.50, and the District Court ordered the deduction of $66,620.36, an amount equal to double the bonus for financing which had been found to have been reserved.

The United States of America and its agent Ralph Delgado were made parties defendant by virtue of seizure of the aircraft under asserted tax liens, were not parties to the appeal and are not parties to this proceeding. Joseph G. Moretti is the holder of a mortgage encumbering the aircraft and inferior to the mortgage lien of respondent Aviation Credit Corporation.

Appeals to the United States Court of Appeals were taken by these petitioners and by respondent Aviation Credit Corporation, these petitioners contending that the District Court should have deducted the additional sum of $169,997.62, being the amount equal to double the interest exacted, to wit, $84,994.31, and Aviation Credit contending that neither the interest nor the bonus should have been doubled and deducted from the actual principal sum.

The Court of Appeals affirmed the trial court's finding of civil usury, but held that neither the interest nor the bonus had been paid by these petitioners, nor reserved, taken or exacted by respondents, within the prohibitions of Florida law.

The District Court's findings of fact and conclusions of law appear on pages 104 through 115 of the transcript of record. The opinion of the Court of Appeals dated June 30, 1960, appears as Appendix A attached to this petition. On August 31, 1960, the Court of Appeals entered its order staying its mandate for a period of thirty days to enable

these petitioners to apply for and obtain a writ of certiorari from this honorable court, the stay to continue in force until final disposition of the case by this Court (R. 812).

ARGUMENT

Jurisdiction of this court in the premises is based upon the fact that the United States Court of Appeals, by the decision here sought to be reviewed, has decided an important question in a way in conflict with applicable state law. U.S. Sup. Ct. Rule 19(b).

By adopting a rule contrary to that followed uniformly and without a single departure in the Florida state courts, the Court of Appeals has thrown the usury law in Florida into a state of extreme confusion. This conflict between the decision of the federal court and the decisions of the Florida courts necessarily will result in uncertainty, confusion, doubt and multitudinous litigation in the fields of commerce and finance in this area of our nation. Further, it is sure to result in races to court and forum shopping among parties to real or imagined grievances.

Every Florida case on the point here in issue holds that the inclusion in the face principal sum of a negotiable note of excessive interest or bonus raises a positive requirement of law that double the sum so included be deducted from the actual principal sum involved.

There is no other or alternative rule in Florida law, and once the Court has found, as in the instant case, that the lender has included usurious interest or bonus in the

face principal sum of a negotiable note, it follows necessarily, conclusively and as a matter of law that such interest or bonus has been reserved and exacted.

In **Wilson v. Conner** (Fla. 1932) 106 Fla. 6, 142 So. 606, **the borrower never had paid a dime to the lender, either interest or principal.** In that case a negotiable promissory note was taken in the face amount of $10,000.00. Of the $10,000.00 sum, $500.00 was found to be a bonus charged by the lender and $800.00 was found to represent one year's interest at 8% per annum. The Florida Supreme Court specifically held that the actual principal sum received by the borrower was only $8,700.00, and that inclusion of the $1,300.00 sum representing interest and bonus, constituted an exaction and reservation by the lender of $1,300.00, requiring deduction from the $8,700.00 actual principal sum of an amount equal to twice the $1,300 charge. A penalty of $2,600.00 was deducted, leaving a balance due of $6,100.00.

The Supreme Court of Florida in that case said:

> "In the case at bar there was a **negotiable promissory note** executed by the lender **which included in the principal sum** thereof **the concealed amount of $1,300 usurious interest,** with nothing on the face of such note to indicate that fact. **Such note in contemplation of law constitutes an exaction of the interest included in the principal sum stated in the face of the note as part of the principal.** By including such interest in the amount of the principal, **the lender,** in contemplation of law, **thereby took, reserved, and exacted such interest as effectually as if the ac-**

tual money itself to pay such usurious interest had been demanded and paid in advance to the lender.

* * *

"Therefore, not only did the lender forfeit the right to receive under his contract any interest on the actual amount loaned, because of his usurious agreement, but he also incurred, in addition thereto, the forfeiture of double the amount of the usurious interest **which in contemplation of law had already been reserved, paid or exacted from the debtor at the time the note and mortgage were signed.** This means that the lender has forfeited, in addition to all interest which he might legitimately have otherwise collected on the actual loan of $8,700, an additional sum of $2,600 as a penalty for the accomplished wrong done by the exaction made.

"This sum of $2,600 for the forfeiture is arrived at on the principle stated by Mr. Justice Ellis in Sullivan v. Thumm, supra, by doubling the usurious interest ($1,300) originally reserved, paid, or exacted. Therefore the actual amount loaned of $8,700, less all interest agreed to, less $2,600 penalty, is the proper amount of the decree that should have been entered in this case for the mortgage debt." (pp 608-609) (Emphasis added)

In 1933, the Florida Supreme Court again spoke on the point involved, in the case of **Sherman** v **Myers**, 108

Fla. 129, 146 So. 213. In that case the lender took a note and mortgage in the face amount of $40,000.00 when in fact the borrower received the principal sum of only $32,000.00. The chancellor had found this disparity and had deducted the $8,000.00 from the $40,000.00 note, ordering the $32,000.00 balance payable. Upon appeal, the Supreme Court held that the lender was required to forfeit the entire interest charged or contracted for, and in addition thereto must forfeit double the amount of interest which had been reserved, taken or exacted. The court expressly held that the inclusion in the principal of the negotiable promissory notes of the sum of $8,000.00 constituted a reservation thereof by the lender, subjecting the lender to a penalty of double the $8,000.00, and the court reversed the chancellor and ordered him to deduct from the $32,000.00 principal sum a penalty of $16,000.00, being double the $8,000.00 reserved by inclusion in the promissory notes.

The holding in **Sherman** v. **Myers**, like the holding in **Wilson** v. **Conner**, is clear and unequivocal. In each of the cited cases the trial court had found as a fact inclusion of interest or bonus in the face of a negotiable note and had forfeited that amount, but in each case the trial court had refused to take the next step, namely enforcement of the statutory penalty of double the amount of the charge. It is significant that the appellate court in each case held the matter to be one of positive law and in each instance reversed the trial court and affirmatively ordered deduction of double the interest or bonus so reserved.

The factual situation in the instant case is absolutely identical with the facts in the cited cases, and we respectfully insist that the controlling law gives the court no

alternative but to enforce the statutory penalty of double the interest and bonus reserved by the plaintiff.

In **Ross** v. **Atlas Finance Corporation** (Fla, 1934) 113 Fla. 793, 152 So. 410, Atlas brought suit to foreclose a mortgage and note in the face amount of $3,500.00. The trial court found the transaction usurious and found that the actual principal sum received was $3,150.00, with a $350.00 bonus having been charged and retained by inclusion of that sum on the face of the note. The trial court deducted double the amount of the bonus and interest, but made the deduction from the face amount of the note. On appeal by the borrower it was held that the deduction of double the amount of the bonus and interest should have been made from the sum of $3,150.00, which was the amount actually received by the borrower from the lender. The decree was ordered modified accordingly and as modified was affirmed.

Still another case directly in point is that of **Carr** v. **Cole** (Fla. 1935) 119 Fla. 260, 161 So. 392. In this case the lender advanced $8,600 and required the borrower to execute a note for $10,000.00 plus interest. The borrower had paid interest in the sum of $3,100.00, and the interest contracted for would have amounted to $4,000.00 to maturity of the note. The trial court found the transaction to be usurious and ordered the debt discharged. The Supreme Court affirmed the chancellor, finding that the loan was tainted by civil usury and holding that both the excess sum of $1,400.00 included in the note and the interest actually paid should be doubled, and forfeited to the borrower. When doubled, the $1,400.00 and the $3,100.00, totaling $9,000.00 was deducted from the actual principal sum involved of $8,600.00 and a balance of $400.00 re-

mained due to the borrower from the lender. The trial court, however, did not allow an affirmative judgment against the lender but merely declared the principal and interest forfeited and the debt discharged. This decree of the chancellor was affirmed by the Supreme Court after thorough review.

The last case squarely on this point which we discuss in this petition is **Ayvas v. Green** (Fla. 1952) 57 So. 2d 30. There are other cases also holding in accord with those cited in this petition, but we have attempted to avoid stacking citations.

In **Ayvas v. Green**, a bonus of $547.50 was included in the face principal amount of a note and the note also carried interest on its face at 6%. The special master who took the testimony found the transaction tainted by civil usury. The chancellor rejected the master's finding and entered a decree enforcing the note and mortgage involved. No payments, either of principal or interest, had been made by the borrower.

On the borrower's appeal, the court held that the trial court erred in failing to find civil usury; that by reserving a hidden bonus in addition to the apparent interest called for in the note, the lender had reserved, charged or taken interest in excess of the legal rate.

In the words of the court:

> "We hold, then, that the obligation here sought to be foreclosed was civilly usurious at its inception and that the lender must forfeit double the amount of interest 'reserved, charged, or taken,'

in accordance with the provisions of Section 687.04. Since in this case no interest payments were made by the appellants, the forfeiture will apply only to the 'bonus' reserved, to wit, $547.50 ($2700 minus $2152.50), which, when double the amount thereof is deducted from the amount actually loaned, will leave a balance due the lender, on the particular obligation here sought to be foreclosed, of $1,057.50." (p. 34)

It is significant to note that in each of the cited Florida cases, the appellate court has ordered this double deduction to be made as a positive requirement of law. The United States Court of Appeal in the instant case recognizes that if the bonus was taken or reserved by Aviation Credit Corporation the deduction of double the sum of the bonus was required. The court's failure to recognize that the interest and bonus were reserved and exacted **at the time the notes were signed** flies in the face of every reported Florida case, and must be corrected if this extremely important area of law is to remain clear in Florida commerce and finance.

The widespread public impact of any departure from earlier holdings as to usury has been recognized and cited by the Florida Supreme Court in **Nelson** v. **Scarritt Motors** (Fla. 1950) 48 So. 2d. 168. In that case the Florida court passed upon another aspect of usury and said:

"In view of these holdings and the fact that thousands of such contracts are now outstanding on the strength of them it is our view that the judgment appealed from must be and is hereby affirmed. . . ."

Already the federal courts are overburdened with work in this region. The decision of the Court of Appeals in this case is certain to increase that burden unnecessarily, with usurers wherever possible scampering to the federal jurisdiction in the hope of becoming beneficiaries of this most substantial deviation from the established law of the State of Florida.

This honorable court can and should avoid this unhappy development by granting its writ of certiorari in this cause and by bringing the federal decisions into harmony with state law as required under the Erie Railroad doctrine.

Respectfully submitted,

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I do certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished by mail to Smith, Ristig and Smith, to Knuck and Anderson, and to Walton, Lantaff, Schroeder, Atkins, Carson and Wahl, this 27th day of September, 1960.

Henry M. Sinclair
Attorney

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18071

CONNER AIR LINES, INC. & F. A. CONNER,

Appellants,

versus

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION & L. B. SMITH,

Appellees,

AVIATION CREDIT CORPORATION,

Appellant,

versus

CONNER AIR LINES, INC., F. A. CONNER & JOSEPH G. MORETTI,

Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(June 30, 1960.)

Before CAMERON, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Conner Air Lines owned a

DC-6 aircraft which had been outfitted for and used as a cargo carrier. Conner Air Lines, herein called Conner, desired to convert the plane into a passenger carrier. It negotiated with a number of firms for specified interior work and among the proposals was one from L. B. Smith Aircraft Corporation, herein called Smith Aircraft. Other work, in addition to that included in the initial proposal, was necessary and 100 seats had to be purchased. Conner was without funds to cover the costs of making the conversion of the aircraft from the one type of use to the other. F. A. Conner, the president and dominant personality of Conner Air Lines, discussed his problem with L. B. Smith, who, in addition to being the president of Smith Aircraft, was president of Aviation Credit Corporation, herein called Aviation Credit. Smith was the guiding genius of both of these corporations. As a result of these discussions a contract was made between Conner and Aviation Credit by which the latter undertook to advance some working capital funds to Conner, to discharge a substantial amount of Conner's existing indebtedness, and to pay for rehabilitation work on the aircraft in an amount up to, but not exceeding, $150,000. It was agreed that Conner would give Aviation Credit a bill of sale for the aircraft, and Aviation Credit would make a conditional sale contract by which Conner would reacquire title to the aircraft upon payment of $505,140.92, in accordance with the terms of a promissory note in that amount given to Aviation Credit by Conner and payable in installments over a thirty-two month period. The amount of the note was the aggregate of Aviation Credit's commitments with interest included at 11.58% computed

on reducing balances. It was expressed in the agreement that Conner would be credited with any sums not advanced or expended by Aviation Credit to or for Conner. The bill of sale, conditional sale contract and promissory note were executed and delivered on November 23, 1956. F. A. Conner individually guaranteed the payment of the note.

At or about the time of the financing arrangement made with Aviation Credit by Conner, the latter entered into a contract with Smith Aircraft for specified work to be done at the agreed price of $150,000. Before February 23, 1957, the date when the first installment payable by Conner to Aviation Credit became due, a supplemental arrangement was worked out under which Smith Aircraft would do additional work on the Conner plane for stated sums. Conner agreed to increase the amount which it had previously agreed to pay for portions of the work which Smith Aircraft had undertaken to do by its original contract. It was claimed by Smith Aircraft that this additional amount was an adjustment made to offset charges incurred by it caused by failures and delays in performance by Conner of its contract promises. Conner asserted that the additional amount was a financing bonus. Aviation Credit agreed to finance the revised deal between Conner and Smith Aircraft and to extend the first four installments. A supplemental agreement was executed and an additional note was given and interest at the rate of 11.58% was included in the amount.

Conner defaulted in its payments to Smith Aircraft. The United States attached the aircraft for the lien

of taxes claimed to be owing by Conner. Smith Aircraft was required to make disbursements for insurance, maintenance costs and to prevent the repossession of radio equipment installed on the aircraft. Aviation Credit gave notice of an intention to repossess the aircraft under the terms of its so-called conditional sale contract and brought suit for a declaration that it was the owner of the aircraft and that Conner had no interest therein. While the suit was pending Smith Aircraft, by amendment, prayed for foreclosure in the event the conditional sale contract should be held to be a mortgage. Conner and F. A. Conner individually asserted that the agreements had been procured through the fraud of Smith Aircraft and Aviation Credit and that usury had been exacted. A mortgage lien was asserted by F. A. Conner, and another by Joseph G. Moretti. The United States asserted its claims for taxes. Testimony was taken over a period of six days.

The district court held that the bill of sale, the conditional sale contract, and the supplemental instruments constituted a mortgage under the provisions of a Florida statute.[1] It was found that, although Smith Aircraft and

[1] All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

Provided however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee for value without notice, holding under the grantee. Fla. Stat. Ann. § 697.01.

Aviation Credit were separate legal entities with different managing officers, they were both under the control and domination of L. B. Smith who, in all material matters, acted for these corporations in the transactions with Conner. The control and relationship was such, as found the district court, that all information on the part of one was information on the part of the other. Of the amounts included in the renegotiated and supplemental agreement, the court found that $33,310.18 was a bonus, and that the bonus added to the interest computed at the 11.58% rate and included in the notes resulted in a charge exceeding the permissive 15% rate and hence constituted usury under the Florida law. The court found that Aviation Credit had advanced $459,083.58, exclusive of the bonus payment. It was found that Aviation Credit had advanced $9,703.99 for the preservation, maintenance and protection of the res. The court held Aviation Credit was entitled to recover this amount with interest at the statutory rate of 6%. It was concluded by the court that Aviation Credit was entitled to recover for the sums actually advanced, without interest or bonus, and less twice the sum of said bonus. It was held that Aviation Credit should be awarded an attorney's fee of $15,000, with the court expressing the opinion that "this charge is reduced from the normal because of the overcharge demands." The court's findings and conclusions were followed by a decree of foreclosure and sale.

Aviation Credit has appealed. It asserts that the bonus, so called, was not a financing bonus but a renegotiation

of a contract between Smith Aircraft and Conner under which Smith Aircraft would otherwise have sustained a loss. It contends that the two corporations, related though they were through the domination of L. B. Smith, were nevertheless separate, and a sum contracted for as a profit by one should not be credited to the other as a usurious exaction. Aviation Credit contends that, assuming there was usury, the court misapplied the Florida usury statute in the imposition of the penalty. Finally, it is said the appellant was entitled to, but was not allowed, a reasonable attorney's fee. Conner and F. A. Conner individually take an appeal and assert that the amount of the penalty for usury as found and imposed by the court was less than the Florida statutory provision requires.

A Florida statute[2] passed in 1925 prohibited corporations from interposing the defense of usury. This provision was repealed[3] in 1953, and the defense of usury then became available to corporations as well as to individuals. *Sodi, Inc. v. Salitan*, Fla. 68 So. 2d 882.

The transaction which was found by the district court to make a usurious transaction was the inclusion of the item of $33,310.18 in the supplementary agreement. The appellant urges that this sum, which Conner agreed to pay, was a profit to Smith Aircraft for work done and to be done by it, and that even though the profit be unreasonable it does not follow that it should be treated as usury so far as Aviation Credit is concerned. Authorities are

2 Laws of Fla. Acts of 1925, Ch. 10096.
3 Laws of Fla. Acts of 1953, Ch. 28170.

cited showing it to be the law of Florida that the difference between a cash price offered and a credit price agreed upon is not to be regarded as interest so as to invoke the application of the law against usury. *Dillon v. J. W. Walter Co.*, Fla. 98 So. 2d 391. But here our problem is not that simple. When the supplemental agreement was made Smith Aircraft had performed a part of the work it had undertaken to do and it was obligated to perform the rest. There was to be a forbearance by Aviation Credit of the then maturing installments of Conner's indebtedness. Other financing was undertaken. Smith Aircraft and Aviation Credit were both represented by L. B. Smith and there is no doubt but that he was authorized to speak for both. The district court found that the $33,310.18 was to be paid as a financing bonus. We cannot say that the facts do not admit of this inference or that the finding is erroneous.

Where there is an intent on the part of a lender to make a loan or to extend a maturity for a greater profit than is permitted by law, the transaction is tainted with usury even though it is cast in a form which was designed to give it a cloak of apparent legality. Courts do not permit the use of design or device to evade the purpose of the usury laws. *Griffin v. Kelly*, Fla. 92 So. 2d 515; *Beacham v. Carr*, 122 Fla. 736; 166 So. 456. The amount of a bonus exacted in connection with financing will be regarded as interest in determining whether the usury law has been violated, and this is true whether the bonus inures to the benefit of the lender, the agent of the lender, or to the benefit of another. *Speier v. Mounah Park Block Co.*, Fla. 84 So. 2d 697; *Stoutamire v. North Florida Loan Associa-*

tion, 152 Fla. 321, 11 So. 2d 570; *Richter Jewelry Co. v. Schweinert*, 125 Fla. 199, 169 So. 750; *Hopkins v. Otto*, 118 Fla. 865, 160 So. 203. The fact that Smith Aircraft and Aviation Credit are separate corporate entities does not prevent the financing bonus from being treated as a usurious exaction in view of the relationship, through L. B. Smith, of the two companies.

In computing the amount which Smith Aviation is entitled to recover, the district court took the amount of the advances made pursuant to the agreement, excluding the bonus, added the amounts paid out for preservation, maintenance and protection with interest on this latter amount. The aggregate of these items was $469,266.52. The district court, in its findings and conclusions, some times referred to the $33,310.18 item as a bonus and at other times as an overcharge. In the decree the court directed that twice the amount of the $33,310.18 item be deducted. This deduction is asserted by the appellants to be unauthorized by the law of Florida.

Two sections of the Florida statutes require our consideration. These are:

> "Unlawful rates of interest defined; proviso.-It shall be usury and unlawful for any person, or for any agent, officer or other representative or any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent

per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and such transactions with a corporation shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds." Fla. Stat. Ann. § 687.03.

"Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face.- Any person, or any agent, officer or other representative of any person, willfully violating the provisions of §687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of in-

> terest so reserved, taken or exacted; provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in Sec. 687.06." Fla. Stat. Ann. § 687.04.

If it is correct to say that the $33,310.18 was taken or reserved, or has been paid by Conner, then the imposition by the court of double the amount of the usurious bonus from the true principal was proper. If there was not any payment, or any taking or reserving of usurious interest, then the full amount of the principal, without interest, may be recovered. *Wilson v. Conner*, 106 Fla. 6, 142 So. 606; *Ross v. Atlas Finance Corporation*, 113 Fla. 793, 152 So. 410; *McGillick v. Chapman*, 134 Fla. 220, 184 So. 26. Where other instruments are executed contemporaneously with a mortgage and as a part of the same transaction, the mortgage may be modified by the other instruments, and all documents are to be read together in order to determine and give effect to the intention of the parties. 59 C.J.S. 208, Mortgages, § 156; *Jackson v. Parker*, 153 Fla. 622, 15 So. 2d 451; *Brumick v. Morris*, 131 Fla. 46, 178 So. 564; *Morrow v. Commonwealth Life In-*

surance Co., 118 Fla. 371, 159 So. 525. The effect of the transactions between Conner, Smith Aircraft and Aviation Credit, was to have conversion and rehabilitation work done by Smith Aircraft on the DC-6 plane of Conner and to provide that payments for this work and other payments and advances for other purposes of Conner should thereafter be made by Aviation Credit and be secured by a lien on the Conner aircraft. These arrangements resulted in a mortgage to secure future advances. Such security transactions are recognized and enforced in Florida.[4] It may be parenthetically noted that there is no question now present in this case as to lien priorities. Cf. *United States v. American National Bank*, 5th Cir. 1958, 255 F. 2d 504, cert. den., 358 U.S. 835, 79 S. Ct. 58, 3 L. Ed. 2d 72, reh. den. 359 U.S. 1006, 79 S. Ct. 1135, 3 L. Ed. 2d 1034. The advances by Aviation Credit were made over a period of about fourteen months.

The provision for the forfeiture of double the amount of the interest exists only if the usurious interest has been paid or has been taken or reserved. Certainly Conner did not pay the so-called bonus to Aviation Credit. Was it otherwise paid, taken or reserved? It was not, unless it can be said that a paying, taking or reserving resulted from the transfer of the amount of the bonus from Aviation Credit to Smith Aircraft. The undertaking of Conner to pay Aviation Credit the $33,310.18 constituted usury, but only because of the relationship between the two Smith corporations. By reason of that same relation-

[4] Fla. Stat. Ann. § 697.04

ship we are precluded from saying that the transfer by one of them to the other is the paying, taking or reserving of the usurious bonus. Because of the relationship, it follows that the situation is no different than if Conner had agreed to pay, but did not pay, the sum to Aviation Credit as additional interest or as a financing bonus. The interjection of the related company, Smith Aircraft, into the arrangement does not change the effect of what was done in so far as concerns the payment by Conner, or the taking or reserving by Smith Aircraft, of the bonus. Hence we reach the conclusion that it was error to determine, as the district court determined, that the bonus of $33,310.18 was paid or taken or reserved.

Smith Aviation appeals from that portion of the court's decree fixing the amount of attorneys' fees awarded to it. In its finding the district court said, "It is the court's opinion that a reasonable attorneys' fee to be awarded to the plaintiff and as against the defendant in this case should be the sum of $15,000.00, this charge is reduced from the normal because of the overcharge demands." It is apparent that the court's phrase "overcharge demands" has reference to the usurious financing bonus of $33,310.18. The statute relating to usury fixes the forfeitures for usury. Where a mortgagee is entitled to foreclose and the mortgage provides for attorneys' fees, the presence of usury will not prevent the recovery of a reasonable attorneys' fee. *Purvis v. Frink*, 57 Fla. 519, 49 So. 1023; *Skinner v. Southern Home Building & Loan Association*, 46 Fla. 547, 35 So. 67. While equitable considerations may be a factor in the determination of a reasonable attorneys' fee, there should not be a reduction from what would

otherwise be reasonable because of conduct for which a specific statutory penalty has been provided and imposed. The amount of a reasonable attorneys' fee to be awarded to Smith Aviation should be reconsidered in the light of what we have here said and decided.

By its appeal, Conner urges that the court should have taken the face of the notes, deducted the amount found to be the true principal and treated the difference as usurious interest reserved by Smith Aircraft. This contention is pretty well disposed of, we think, by what we have heretofore said. It has already been resolved that the transaction was one creating a mortgage to secure future advances. The agreement between Conner and Aviation Credit expressly provided that the stated principal sum should be credited by any sums included therein which were not advanced by Aviation Credit or expended by it on behalf of Conner. We think the contentions made by the appeal of Conner are without merit.

The conclusions here reached are that Aviation Credit is entitled to recover the principal of its advances to or for Conner pursuant to their agreement which the district court has found to be $459,083.58, the amount paid for the preservation, maintenance and protection of the aircraft with interest on such payments, a reasonable attorneys' fee to be determined without diminution because of the usurious aspects of the transactions, and appropriate costs, including costs on this appeal. To carry out

the conclusions here reached the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED

APPENDIX B

JUDGMENT.

Extract from the Minutes of June 30, 1960.

CONNER AIR LINES, INC. & F. A. CONNER,

versus

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION & L. B. SMITH.

No. 18071.

AVIATION CREDIT CORPORATION,

versus

CONNER AIR LINES, INC., F. A. CONNER & JOSEPH G. MORETTI.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in order to carry out the conclusions reached in the opinion of this Court;

It is further ordered and adjudged that the appellants, Conner Air Lines, Inc., and F. A. Conner, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,071

CONNER AIR LINES, INC. & F. A. CONNER,
Appellants.

versus

AVIATION CREDIT CORPORATION, L. B. SMITH AIRCRAFT CORPORATION & L. B. SMITH.
Appellees.

AVIATION CREDIT CORPORATION,
Appellant,

versus

CONNER AIR LINES, INC., F. A. CONNER & JOSEPH G. MORETTI,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

—August 12, 1960—

ON PETITIONS FOR REHEARING

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the Petitions for Rehearing in the above entitled and numbered cause be, and they are hereby DENIED.